Melantrans Sdn Bhd v Carah Enterprise Sdn Bhd (in receivership) & Anor

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-620 OF 1997

NH CHAN, ABDUL MALEK AHMAD AND AHMAD FAIRUZ JJCA

26 JANUARY 1999

Companies and Corporations — *Receivership — Powers of receivers and managers to sell property — Sale and purchase agreement to sell lease — Receivers agents of company — Whether receivers free and empowered to dispose off assets of company — Whether receivers' act in entering into sale and purchase agreement binds company*

The first respondent/plaintiff was the registered proprietor of the lease of the land. The first respondent had created in favour of the second respondent a debenture as well as a legal charge registered under the National Land Code 1965. The second respondent had pursuant to the provisions of the debenture appointed a receiver and manager in respect of all assets and undertakings of the first respondent. The receiver and manager had, as the receiver of the first respondent entered into a sale and purchase agreement with the appellant/first defendant to sell the lease to the appellant. Subsequently, the appellant did not wish to proceed with the agreement on the grounds that the receiver and manager did not have the right or capacity to sell, by contract only, the lease in view of the Federal Court decision in *Kimlin Housing Development Sdn Bhd (Appointed receiver and manager) (In liquidation) v Bank Bumiputra (M) Bhd & Ors* [1997] 2 MLJ 805 ('the *Kimlin* case'). The first respondent applied for a declaration that the sale and purchase agreement between the first respondent and the appellant was valid and binding which was granted. The appellant appealed. The issue in dispute was whether the receiver and manager of the first respondent was entitled to sell the lease on behalf of the first respondent.

Held, dismissing the appeal:

The administrative receivers/managers are the authorized agents of the company under the debenture and as such are authorized to enter into any sale and purchase agreement on the assets of the company, subject however to the obtaining of the prior consent of the debenture holders and which consent was freely given by the second respondent to the court. Under these circumstances, the administrative receivers/managers are to be agents of the company and are thus absolutely free and empowered to dispose off the assets of the company and their act binds the company (see p 307C–E); *Kimlin Housing Development Sdn Bhd (Appointed receiver and manager) (In liquidation) v Bank Bumiputra (M) Bhd & Ors* [1997] 2 MLJ 805 distinguished.

A **[Bahasa Malaysia summary**

Responden pertama/plaintif adalah tuan punya berdaftar suatu pajakan tanah. Responden pertama telah mewujudkan suatu debentur yang berpihak kepada responden kedua dan juga gadaian undang-undang yang didaftarkan di bawah Kanun Tanah Negara 1965. Responden kedua telah menurut peruntukan-peruntukan debentur melantik penerima dan pengurus berkenaan dengan semua aset dan akujanji responden pertama. Penerima dan pengurus telah sebagai penerima responden pertama memasuki suatu perjanjian jual-beli dengan perayu/defendan pertama untuk menjual pajakan tersebut kepada perayu. Kemudian, perayu tidak ingin meneruskan perjanjian tersebut di atas alasan bahawa penerima dan pengurus tidak mempunyai hak atau kapasiti untuk menjual, dengan kontrak sahaja, pajakan tersebut memandangkan keputusan Mahkamah Persekutuan di dalam *Kimlin Housing Development Sdn Bhd (Appointed receiver and manager) (In liquidation) v Bank Bumiputra (M) Bhd & Ors* [1997] 2 MLJ 805 ('kes *Kimlin*'). Responden pertama memohon untuk suatu deklarasi bahawa perjanjian jual-beli tersebut antara responden pertama dan perayu adalah sah dan mengikat, dan ini dibenarkan. Perayu telah merayu. Isu yang dipertikaikan adalah sama ada penerima atau pengurus responden pertama berhak untuk menjual pajakan tersebut bagi pihak responden pertama.

Diputuskan, menolak rayuan tersebut:

Pentadbir penerima-penerima/pengurus-pengurus adalah ejen yang diberikuasa oleh syarikat di bawah debentur dan dengan itu adalah diberi kuasa untuk memasuki sebarang perjanjian jual-beli di atas aset-aset syarikat, tertakluk kepada pemerolehan kebenaran terdahulu pemegang-pemegang debentur dan di mana persetujuan telah diberikan dengan bebas oleh responden kedua kepada mahkamah. Di bawah keadaan-keadaan demikian, pentadbir penerima-penerima/pengurus-pengurus adalah ejen syarikat tersebut dan dengan itu adalah bebas sepenuhnya dan diberi kuasa untuk melupuskan aset syarikat dan tindakan mereka mengikat syarikat tersebut (lihat ms 307C–E); *Kimlin Housing Development Sdn Bhd (Appointed receiver and manager) (In liquidation) v Bank Bumiputra (M) Bhd & Ors* [1997] 2 MLJ 805 dibeza.]

Notes

For cases on powers of recievers, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 393–408.

Cases referred to

Kimlin Housing Development Sdn Bhd (Appointed receiver and manager) (In liquidation) v Bank Bumiputra (M) Bhd & Ors [1997] 2 MLJ 805 (distd)

Legislation referred to

Companies Act 1965 s 183(3)
National Land Code 1965 s 266

Appeal from: Originating Summons No D6–24–257 of 1997 (High Court, Kuala Lumpur)

Ng Chew Hor (*Iqbal Hakim, Sia & Voo*) for the appellant.
DP Naban (*Nitin Nadkarni* and *Karen Wilfred* with him) (*Lee Hishamuddin*) for the first respondent.
Alan Gomez (*Skrine & Co*) for the second respondent.

Cur Adv Vult

Abdul Malek Ahmad JCA (delivering judgment of the court): In the original originating summons dated 10 September 1997, the first respondent/plaintiff had applied for an order against the appellant/first defendant for a declaration that the sale and purchase agreement dated 2 July 1996 between the plaintiff and the defendant for the sale of the plaintiff's lease of the land held under a qualified title HS (D) 143155 PTD 80563 in the Mukim of Plentong, District of Johor Bahru, State of Johor, which said lease was duly registered on 15 January 1992 vide Presentation Number 2474/92, Vol 12, Folio 39 is valid and binding on the plaintiff and defendant and for such further or other relief and costs.

In an amended originating summons on 24 September 1997 the second respondent was brought in as second defendant and the main prayer was amended to read that the receiver and manager of the plaintiff is duly empowered to sell the plaintiff's lease of the said land as described in the original originating summons.

As stated by learned counsel for the appellant and learned counsel for the first respondent in their respective skeletal submissions, the agreed facts were as follows:

(a) the first respondent is the registered proprietor of the lease of the said land;

(b) the first respondent had created in favour of the second respondent a debenture;

(c) the first respondent has also created in favour of the second respondent a legal charge registered under the National Land Code 1965 ('the Code');

(d) the second respondent had pursuant to the provisions of the said debenture appointed a receiver and manager in respect of all the assets and undertakings of the first respondent;

(e) the said receiver and manager had, as the receiver of the first respondent, entered into a sale and purchase agreement dated 2 July 1996 with the appellant to sell the said lease to the appellant subject to the terms and conditions contained therein;

(f) the appellant did not wish to proceed with the said agreement on the grounds that the receiver and manager did not have right or the capacity

A to sell, by contract only, the said lease in view of the Federal Court decision in *Kimlin Housing Development Sdn Bhd (Appointed receiver and manager) (In liquidation) v Bank Bumiputra (M) Bhd & Ors* [1997] 2 MLJ 805 ('the *Kimlin* case').

What is disputed is the fact that the receiver and manager of the first B respondent is entitled to sell the lease on behalf of the first respondent.

The learned trial judge in his brief judgment said:

> The question for the court before granting the prayer as sought is to look at the memorandum and articles of the said company to see as to whether or not the company has an object clause to sell its land; and whether or not the C articles of the company have reserved any provisions in the granting of the lawful power of attorney in favour of the receivers/managers.
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> I find as a fact that the administrative receivers/managers are the authorised agents of the company under the debenture and as such are authorised to enter into any sale and purchase agreement on the assets of the company; subject however to the obtaining of the prior consent of the D debenture holders and which consent was freely given by the second defendant to the court. Therefore, the need on the part of the receivers/managers in any way invoking the orders of the High Court 1980 only become applicable where such sale is proceeded by the *chargee* under its foreclosure proceedings and not where the chargor so proceeds with the sale by consenting parties.
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> E I hold, that under these circumstances the administrative receivers/managers as agents of the company are absolutely free and empowered to dispose off the assets of the company; and their act binds the company.
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> In passing, I also take the opportunity to make my comments on a point of procedure to be adopted where administrative receivers are appointed and proceedings filed in court. Such proceedings should only be taken in the name F of the company; and not in the name of the company in bracket (under receivership) in the heading of the action. That heading should only be reserved for cases where the company is in liquidation; to distinguish early and easily as to the status of the company in winding-up. This can be done by placing the details of the administrative receivership in the supporting affidavit.
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> G I accordingly make and grant the declaration as amended, with no order as to costs.

Our task was made easier by the fact that the presiding judge hearing this appeal was a member of the panel in the *Kimlin* case and we are in total agreement with the learned counsel for the first respondent's skeletal H submissions as to the distinguishing features in that case and in this appeal that we found it quite unnecessary to hear his reply nor the reply from learned counsel for the second respondent.

The distinguishing features are:

I (a) in the *Kimlin* case, the chargor company was wound-up and consequently, the receivers and managers ceased to be agents of the chargor company;

(b) in the present case, the chargor was not wound-up;

(c) the debenture under consideration here empowers a receiver and manager appointed under the debenture to act as agent of the first respondent, in the exercise of the powers accorded to the receiver and manager under the debenture;

(d) the debenture under consideration here contains a validly constituted power of attorney clause, irrevocably appointing the receiver and manager the lawful attorney of the first respondent;

(e) the provisions of the Code deal with the powers of a chargee to sell land charged under the Code so that any receiver and manager appointed by the creditor of the charged property must conform to the Code;

(f) at any time before an order for sale is made, a chargor can sell land charged under the provisions of the Code by way of private treaty where the proceeds of sale are sufficient to settle the outstanding debt or where the chargee consents;

(g) where an order for sale has been obtained, the charged land must be sold by public auction, subject to the right of the chargor to pay off its indebtedness to the chargee in full to the registrar of the court before the sale of the charged land, under the provisions of s 266 of the Code;

(h) the first respondent in the present case, as the registered proprietor of the lease, is entitled to deal with the lease in such manner as a registered proprietor would, subject to the rights of the encumbrancer, namely, the second respondent.

We hasten to add that in the *Kimlin* case, it was the borrower company that was complaining about the sale apart from being wound-up whereas here it is the borrower company that is asking for the sale order and it has never been wound-up.

Although sub-s (3) of s 183 of the Companies Act 1965 gives the power to a receiver and manager of the property of a company to apply to the court for directions in relation to any matter arising in connection with the performance of his functions, this is merely discretionary and it was our considered opinion that the borrower company here need not even apply to the court for their receiver and manager to sell the lease of the said land to the appellant. In short, we would even venture to say that the appellant had been wrongly brought to court.

We only wish to point out two typographical errors. Firstly, the name of the appellant is spelt as 'Melantrans' in all the headings of the appeal records and the cause papers, except for the skeletal submissions of learned counsel for the first respondent, whereas in actual fact it should be 'Melatrans' as stated in the relevant agreement dated 2 July 1996. Secondly, the correct title of the second respondent should be 'Perdana Merchant Bankers Bhd' and not 'Perdana Merchants Bankers Bhd'.

A We unanimously dismissed the appeal and although learned counsel for the first respondent asked for costs, we felt that in these circumstances, each party should bear their own costs while we ordered the refund of the deposit to the appellant.

Appeal dismissed.

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Reported by Wong Siok Chin

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